IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 01-30221

DONNA MARIE RIMMER

Debtor

PUBLISHED:

NOTICE OF APPEAL FILED: July 31, 2001

DISTRICT COURT NO.: 3:01-CV-450

DISPOSITION:

1. Affirmed order by U.S. Bankruptcy Court for Eastern District of Tennessee disallowing Appellant's exemption of $21,000 claimed in her former husband's retirement account under TCA § 26-2-105(b)-(c) *(aff'd 4/15/02)*.
2. Notice of Appeal to U.S. Court of Appeals for Sixth Circuit filed on May 14, 2002.
3. Cause dismissed for want of prosecution *(Appellant's brief or stipulation to dismiss not filed pursuant to Rule 45(a), Rules of the Sixth Circuit)* filed September 27, 2002.

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 01-30221

DONNA MARIE RIMMER

Debtor

MEMORANDUM ON DEBTOR'S MOTION TO RECONSIDER

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RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

Presently before the court is the Motion to Reconsider and/or Motion for Additional Findings (Motion to Reconsider) filed by the Debtor on June 25, 2001. The Debtor asks the court to revisit its June 15, 2001 Order sustaining the Trustee's Objection to Debtor's Claim of Exemption. By its Order, the court disallowed the Debtor's claimed exemption of an interest in her ex-husband's retirement account (Retirement Account). *See In re Rimmer*, No. 01-30221, slip op. (Bankr. E.D. Tenn. June 15, 2001).

The Motion to Reconsider was accompanied by a supporting brief. A Response and Brief of Trustee to Motion to Reconsider and/or Motion for Additional Findings was then filed by the Trustee on July 10, 2001.

I

The factual background of this case has been previously set forth by the court, *see Rimmer*, slip op. at 2-3, and will therefore be recounted only briefly. Pursuant to a Judgment of Absolute Divorce filed on November 17, 2000, and the Marital Dissolution Agreement incorporated therein, the Debtor owned the right to receive approximately $21,000.00 from the Retirement Account. On January 16, 2001, the date the Debtor filed her Chapter 7 Petition, that right became part of the Debtor's bankruptcy estate. *See* 11 U.S.C.A. § 541(a)(1) (West 1993).

By Schedule C to her Voluntary Petition, the Debtor claimed her interest in the Retirement Account as exempt pursuant to TENN. CODE ANN. § 26-2-105(b) (2000), which exempts, *inter*

alia, any interest of a beneficiary in a qualified retirement plan.[1] The Debtor then amended her Schedule C on March 28, 2001, to add TENN. CODE ANN. § 26-2-105(c) as an alternate ground for exemption. Section 26-2-105(c), in relevant part, exempts interests of alternate payees under a qualified domestic relations order (QDRO).

The court denied the Debtor's § 26-2-105(b) exemption, finding no evidence that the Debtor was a beneficiary of the Retirement Account on the date she commenced her bankruptcy case. *See In re Miller*, 246 B.R. 564, 566 (Bankr. E.D. Tenn. 2000) (Exemption rights are fixed as of the commencement of the case). The court also denied the § 26-2-105(c) exemption because no QDRO was in place on the date of the Debtor's bankruptcy filing. *See id*.

II

The court construes the Motion to Reconsider as a motion to alter or amend a judgment under FED. R. CIV. P. 59(e) and FED. R. BANKR. P. 9023.[2] *See Huff v. Metropolitan Life Ins. Co.*, 675 F.2d 119, 122 (6th Cir. 1982). The successful Rule 59(e) movant must show the existence of newly discovered evidence unavailable at trial, a manifest error of fact or law by the court, an intervening change in the law, or the need to prevent manifest injustice. *See Helton v. ACS Group*, 964 F. Supp. 1175, 1182 (E.D. Tenn. 1997); *see also Gencorp, Inc. v. American*

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[1] The funds at issue arise from the Debtor's Marital Dissolution Agreement and Judgment of Absolute Divorce rather than from her purported status as a beneficiary of the Retirement Account. Nonetheless, the beneficiary issue is relevant because § 26-2-105(b) exempts "any" interest of a beneficiary, rather than only those interests of the beneficiary *qua* beneficiary.

[2] The Debtor's Motion to Reconsider is also a motion to amend findings under FED. R. CIV. P. 52(b) and FED. R. BANKR. P. 9014 and 7052. The grounds for granting Rule 52(b) and Rule 59(e) motions are substantially identical. *See In re National Magazine Publ'g Co.*, 172 B.R. 237, 239 (Bankr. N.D. Ohio 1994); *Braun v. Champion Credit Union (In re Braun)*, 141 B.R. 144 (Bankr. N.D. Ohio 1992); *In re Valley Kitchens, Inc.*, 51 B.R. 113 (Bankr. S.D. Ohio 1985).

Int'l Underwriters, 178 F.3d 804, 834 (6th Cir. 1999); *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998); *Seale v. Home Cable Concepts, Inc. (In re Best Reception Sys., Inc.)*, 219 B.R. 980, 987-88 (Bankr. E.D. Tenn. 1998).

The Debtor initially argues that her interest in the Retirement Account, pursuant to 11 U.S.C.A. § 541(c)(2) and/or (d), is not property of the estate, thereby making the issue of its exemption moot. The court has carefully reviewed the prior documents filed in this case, along with the trial transcript, and determined that these theories were not previously raised by the Debtor. As the Sixth Circuit has observed:

> Rule 59(e) motions are aimed at *re* consideration, not initial consideration. Thus, parties should not use them to raise arguments which could, and should, have been made before judgment issued.

Sault Ste. Marie Tribe, 146 F.3d at 374 (quoting *FDIC v. World Univ. Inc.*, 978 F.2d 10, 16 (1st Cir. 1992)) (emphasis in original); *accord Helton*, 964 F. Supp. at 1182. Rule 59(e) does not provide a movant with the opportunity to present her case under new theories. *See Helton*, 964 F. Supp. at 1182; *In re Watson*, 102 B.R. 112, 113 (Bankr. S.D. Ohio 1989). Accordingly, because the Debtor failed to timely raise her § 541(c)(2) and (d) arguments at trial, those theories are now barred. *See Sault Ste. Marie Tribe*, 146 F.3d at 374.

The Debtor next restates the argument that her interest in the Retirement Account is exempt under TENN. CODE ANN. § 26-2-105(c). *See generally Rimmer*, slip op. at 6-7 (denying the Debtor's § 26-2-105(c) exemption because no QDRO was in place as of the commencement of this case). The Debtor references no previously unavailable evidence or error of law or fact to warrant the court's reconsideration of this previously determined issue. ?A Rule 59(e) motion is not

intended to provide the parties an opportunity to relitigate previously decided matters[.]" *Watson*, 102 B.R. at 113. Rule 59(e) is not a "substitute for appeal." *In re Oak Brook Apartments of Henrico County, Ltd.*, 126 B.R. 535, 536 (Bankr. S.D. Ohio 1991); *accord Helton*, 964 F. Supp. at 1182 (citation omitted) (For parties who wish to "rehash" old arguments, the proper avenue is appeal.). The court will not revisit the Debtor's previously rejected § 26-2-105(c) argument.

Next, the Debtor reasserts her entitlement to a § 26-2-105(b) exemption as a beneficiary of the Retirement Account. In support, the Debtor submitted with her Motion to Reconsider two Beneficiary Designation Forms. These documents were not among the evidence presented at trial.

The first Beneficiary Designation Form, dated June 27, 2000, and signed by the Debtor's ex-husband, names the Debtor as the Primary Beneficiary under the Retirement Account. The second Beneficiary Designation Form, dated April 17, 2001, and again signed by the Debtor's ex-husband, is offered as proof that the Debtor's beneficiary status was not revoked until approximately three months after the commencement of her bankruptcy case. Together, the Beneficiary Designation Forms are offered as proof that the Debtor was indeed a beneficiary of the Retirement Account on the date she filed her bankruptcy petition.

As previously noted, evidence offered in support of a Rule 59(e) motion must have been unavailable to the movant at trial. *See Gencorp*, 178 F.3d at 834. In other words, the evidence must be such that the movant could not have previously discovered it. *See Best Reception Sys.*, 219 B.R. at 987-88. The burden of establishing unavailability rests with the movant. *See id.*

The Debtor offers no proof that the Beneficiary Designation Forms could not have been timely discovered.[3] Accordingly, the court will not now consider this evidence that the Debtor could, and should, have presented at trial.

Lastly, in further support of her claimed § 26-2-105(b) exemption, the Debtor asserts that the court misconstrued a stipulation regarding her beneficiary status. The Debtor references Stipulation 2 of the Stipulation of Facts submitted at trial which states **?**Donna Rimmer was a beneficiary under Robert Rimmer's 401-K [sic] account with Denso." To style the Debtor's argument in the relevant lexicon of Rule 59(e), either a **?**manifest error of fact by the court" or a **?**manifest injustice" must have resulted from the court's findings regarding this vaguely-worded stipulation.

As discussed above, in order for the Debtor to exempt her interest in the Retirement Account under § 26-2-105(b), she must have been not only a beneficiary of the plan, *see* TENN. CODE ANN. § 26-2-105(b), but also a beneficiary of the plan on the date of her bankruptcy filing. *See Miller*, 246 B.R. at 566. **?**It is hornbook bankruptcy law that a debtor's exemptions are determined as of the time of the filing of his petition." *In re Friedman*, 38 B.R. 275, 276 (Bankr. E.D. Pa. 1984).

The objecting party bears the burden of proving that a debtor's exemption is not properly claimed. FED. R. BANKR. P. 4003(c). This burden is satisfied by the introduction of evidence rebutting the *prima facie* validity of the claimed exemption. *See Lester v. Storey (In re Lester)*, 141

[3] In fact, the Debtor offers no explanation whatsoever why these two pivotal exhibits were not previously introduced.

B.R. 157, 161 (S.D. Ohio 1991). The burden then shifts to the debtor to show that the exemption is proper. *See id*.

Regarding the Debtor's use of § 26-2-105(b), the Trustee met her initial evidentiary burden by introducing the Judgment of Absolute Divorce and Marital Dissolution Agreement as proof that the Debtor's Retirement Account interest arose from those documents rather than as a beneficiary of the Retirement Account. The burden then shifted to the Debtor to show that she was, at the time of the commencement of her bankruptcy case, a beneficiary properly entitled to this exemption.

The Debtor's trial presentation regarding her beneficiary status consisted solely of the vaguely-worded Stipulation 2 and the unsupported assertion by Debtor's counsel during closing arguments that ?Ms. Rimmer was a beneficiary under her husband's retirement fund, even at the time of filing bankruptcy."[4] In reaching its prior decision, the court considered Stipulation 2, specifically commenting:

> In their Stipulation of Facts, the parties stipulate that the Debtor ?*was* a beneficiary under Robert Rimmer's 401-K [sic] account with Denso." (emphasis added). The court logically construes this stipulation to mean that the Debtor was a beneficiary of the Retirement Account prior to her divorce. After the divorce, her interest in her former husband's 401(k) plan was fixed by the MDA incorporated into the November 17, 2000 Judgment of Absolute Divorce.

Rimmer, slip op. at 4 n.3. By Stipulation 2, as it was worded, the parties placed into the record their agreement that the Debtor, at some unidentified point in time, ?was" a beneficiary of the Retirement Account. The stipulation did not establish whether the Debtor was a beneficiary

[4] The entire focus of the Debtor's counsel on direct examination of the Debtor was § 26-2-105(c). She elicited no testimony from the Debtor relating to the § 26-2-105(b) issue.

before, during, or after her marriage and it unquestionably did not establish that she was a beneficiary on the date of her bankruptcy filing.[5]

In short, the record at trial contained no evidence that the Debtor was a beneficiary of the retirement plan as of the commencement of this case. Absent any supporting evidence in the record before it, the court could not have found that the Debtor was entitled to an exemption under § 26-2-105(b). The court committed no "manifest error of fact" through its reasonable interpretation of Stipulation 2.

As for the issue of "manifest injustice," while "serious misconduct of counsel" may warrant relief under this theory, *see Sommers Co. v. Bell (In re Bell)*, 195 B.R. 818, 822 (Bankr. S.D. Ga. 1996) (dicta), the court's research reveals no authority that "manifest injustice" may result merely from a party's failure to adequately present its case. Conversely, the Fifth Circuit has commented:

> Each of the parties was given full opportunity to submit to the trial court that evidence which it thought was relevant . . . . If [the movant] believed that its [evidence] was relevant, and if the proof was readily available--as it most certainly was . . .--it was incumbent upon [the movant] to come forward with that evidence. Quite simply, the District Court drew an eminently reasonable inference from the evidence in the record and relied on that inference in making its findings of fact. That other evidence not in the record may negate the District Court's inference is beside the point. Blessed with the acuity of hindsight, [the movant] may now realize that it did not make its initial case as compellingly as it might have, but it cannot charge the District Court with responsibility for that failure through this Rule 52(b) motion.

Fontenot v. Mesa Petroleum Co., 791 F.2d 1207, 1220 (5th Cir. 1986); *accord Braun v. Champion Credit Union (In re Braun)*, 141 B.R. 144, 146 (Bankr. N.D. Ohio 1992) (noting the

[5] The court has carefully reviewed the briefs relating to the current motion and is compelled to note that the parties' agreed meaning of Stipulation 2, if the parties in fact ever had an agreed understanding of what they were stipulating, remains unclear.

?compelling interest in the finality of litigation"); *see also Gencorp*, 178 F.3d at 834 (?A decision to reopen this case would subvert the judicial imperative of bringing litigation to an end and would serve no need other than to correct what has - in hindsight - turned out to be a poor strategic decision by [the Plaintiff]."); *In re Braithwaite*, 197 B.R. 834, 835 (Bankr. N.D. Ohio 1996) (?A party who failed to prove [her] strongest case is not entitled to a second opportunity by moving to amend a finding of fact and a conclusion of law.") (citations omitted).

For the above reasons, the Debtor's Motion to Reconsider and/or Motion for Additional Findings must be denied. An appropriate order will be entered.

FILED: July 23, 2001

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 01-30221

DONNA MARIE RIMMER

Debtor

O R D E R

For the reasons set forth in the Memorandum on Debtor's Motion to Reconsider filed this date, the court directs that the Debtor's Motion to Reconsider and/or Motion for Additional Findings filed June 25, 2001, requesting the court to alter or amend its June 15, 2001 Order sustaining the Trustee's Objection to Debtor's Claim of Exemption and disallowing the Debtor's exemption of $21,000.00 claimed in her former husband's retirement account under TENN. CODE ANN. § 26-2-105(b) and (c), is DENIED.

SO ORDERED.

ENTER: July 23, 2001

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE